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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

STANLEY L. WADE,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to Article III, Section 2, Clause 3, and the Sixth Amendment, can a defendant be found guilty of additional crimes at sentencing which expose him to more than six months in prison by a judge alone, given Justices Kennedy's and Breyer's statement in *Lewis v United States*, 518 U.S. 322, 331, that the right attaches for serious crimes?

2. If the right to a jury trial is "the spinal column of American Democracy," as Justice Scalia expressed in *Neder v United States*, 527 U.S. 1, 30 (concurring and dissenting opinion), would the fact that Petitioner was tried, found guilty and sentenced to forty months over the statutory maximum for the charged crimes, supported by both fact and caselaw, have equated to "a substantial showing of the denial of a constitutional right," urging a COA be granted?

3. Did the Tenth Circuit err when it denied a COA, depriving it of jurisdiction pursuant to *Miller-El v Cockrell*, 537 U.S. 322, 336-37, and then went ahead and decided an issue on its merits which could only be so decided after an in-depth review of the facts, transcripts and record, but they were prohibited from doing more than a "threshold inquiry" pursuant to *Miller-El*, 537 U.S. at 327?

4. If the "statutory maximum" for a crime is five years and the judge finds guilt for separate crimes which expose a defendant to more than twice the statutory maximum and then imposes a sentence forty months over the statutory maximum, did that court exceed its lawful authority, given Justice Stevens' concurring opinion in *United States v Santos*, 170 L. Ed. 2d 912, 928, that if "a defendant has significant criminal history or Guideline enhancements apply, the statutory cap of five years in § 1955

is an important limitation on a defendant's sentence"?

5. Is a defendant procedurally barred from raising grounds in a § 2255 which were erroneously raised, argued and not supported on direct appeal, given this Court's decision in *Massaro v United States*, 538 U.S. 500, 509, especially when the ineffective assistance severely prejudiced the defendant and there is a reasonable probability that but for counsel's serious errors the result of the proceeding would have been different?

6. Should a COA have been issued under circumstances very similar to those the Court decided in *Miller-El v Cockrell*, 537 U.S. 322?

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CITATIONS OF OPINIONS BELOW

The decision of the Tenth Circuit denying a Certificate of Appealability ("COA") and filed August 18, 2009, is appended at Appendix Pages A-1—A-5. The Memorandum Decision and Order denying Petitioner's § 2255, Hon. Ted Stewart, District Judge, District of Utah, is appended at Appendix Pages B1—B15. He denied the motion on February 18, 2009. The Tenth Circuit's denial of a Petition for Rehearing is appended at Appendix Page C-1. It was filed on September 11, 2009. The denial of Petitioner's Fed.R.Civ.P. 59(e) Motion by Judge Stewart was filed on March 23, 2009. It is appended at Appendix Pages D-1—D-2.

JURISDICTION

The denial of Petitioner's Petition for Rehearing to the Tenth Circuit was filed on September 11, 2009. The denial of Petitioner's Application for a COA was filed on August 18, 2009.

The denial of certiorari following direct appeal in this Court was filed on November 5, 2007. Petitioner mailed his timely §2255 on June 8, 2008, within the one-year limitation under §2255(f)(1). It was denied on February 18, 2009, and a Rule 59(e) Motion was denied on March 23, 2009.

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253(c)(1)(B).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. 157:

A person who, having devised or intending to devise a scheme or artifice to defraud...[and] files a petition under title 11,...shall be fined...[or] imprisoned not more that 5 years.

18 U.S.C. 1509:

Whoever,...willfully...interfere[s] with...the performance of any duties under any court order...shall be...imprisoned not more than one year..."

26 U.S.C. 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall...[be] imprisoned not more than 5 years...."

28 U.S.C. § 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review on appeal, by the court of appeals for the circuit in which the proceeding is held...

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from...

(B) The final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255(a):

A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct that sentence.

Article III, Section 2, Clause 3:

The Trial of All Crimes, except in cases of Impeachment, shall be by Jury...

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner and his wife operated seven apartment complexes in Salt Lake City, Utah. In 1992, after an accident which could have exposed all of the apartments to liability, they sought advice from an attorney as to how to limit the liability and protect at least some of their assets. He suggested they form a separate Unincorporated Business Organization. ("UBO") for each complex, which is essentially an irrevocable trust.

A second objective was to facilitate an estate plan designed to eliminate many of the vagaries of probate. (Petitioner's mother's estate was just settled after 16 years in probate.) Petitioner was also informed that income from the UBOs would not be taxed until withdrawn. This was pitifully poor advice; it led to his arrest in 2004 on tax evasion. The district court determined that the taxes evaded, including interest and penalties, was over $5.7 million—all of which has now been paid.

The indictment alleged (case no. 2:04-CR-141-TS) that Petitioner had evaded $2.388 million. The jury found him guilty on all seven counts, one for conspiracy with his wife, four for violating § 7201, and two involving an earlier bankruptcy. The statutory maximum for these crimes was five years. The Guideline BOL range was 51 to 63 months.

Petitioner's wife entered into a diversion agreement and avoided trial. At sentencing, the Government alleged that other crimes had been committed, namely, evading $1.212 million in taxes and obstruction of justice, in violation of 18 U.S.C. § 1509. Consequently, Petitioner received a 100-month sentence, forty months over the statutory maximum under § 7201 and 18 U.S.C. § 157, both of which

charges are grouped in the Guidelines. (U.S.S.G. §3D1.2.)

A trial, the most damaging evidence was testimony regarding an attorney-client privileged letter which the lower court had ruled admissible because the judge concluded that because he said the two top managers who saw it worked for the UBOs and not Petitioner; this over repeated testimony during an in limine and a *James* hearing during which both repeatedly testified that they worked for Petitioner. In fact, one testified that he had received the letter first and had given it to Petitioner! The content of the letter was that in that attorney's belief the UBOs did not defer taxation. Petitioner and his two top managers discounted the conclusion of the attorney as it was apparent that he didn't even understand what UBOs were; additionally, other attorneys and tax experts advised to the contrary and even the I.R.S. advised that no Federal Tax I.D. Number was needed for UBOs.

On direct appeal, Petitioner was represented by another attorney—his trial counsel provided such woefully ineffective assistance that Petitioner refused to employ him for the appeal. Appellate counsel Mary Corporan raised a *Booker* issue with respect to sentencing; however, she failed to adequately support or argue it. With respect to the breach of the attorney-client privilege, she represented that only one of the two top managers had seen the letter. She also failed to provide the record, the memorandums and advise the court that these two were top managers and that one testified that he had received the letter and gave it to Petitioner. The Tenth Circuit concluded that Ms. Corporan's errors provided "an independent ground to uphold the court's ruling." (*United States v Wade*, 203 Fed. Appx. 920, 923-924, page 36 in Petitioner's petition for certiorari, case no. 07-14) (denied November 5, 2007) (169 L. Ed. 2d 371.)

On June 8, 2008, Petitioner mailed a timely § 2255 Motion in the District of Utah. (Case No. 2:08-CV-741-TS) The grounds raised included a jurisdictional challenge to the judge's trial, conviction and sentence for crimes which exposed him to more than six months in prison without a jury, all in violation of Article III, Section 2, Clause 3, and the Sixth Amendment. Other issues involved the breach of the attorney-client privilege under ineffective assistance of appellate counsel; the ineffective assistance of both trial and appellate counsel to not that Count Five of the indictment was obviously fatally flawed due to the admission in Count One; and a couple of lesser grounds not relevant to this Petition. The first ground was essentially a challenge to the jurisdiction of the court.

Judge Ted Stewart denied the motion for two primary reasons. He said that the first two issues were procedurally barred because the Tenth Circuit had considered the sentence issue, which appellate counsel raised solely under *Booker*, and that they had decided that the lower court's conclusion that "[n]either Passey nor Powell [the top two managers who had seen the letter] were employees or agents of Mr. Wade, but rather the UBOs." (Page 34 of Ms. Corporan's Petitioner for Certiorari; 203 Fed. Appx., at about 923.) Lastly, Judge Stewart decided that trial counsel did not challenge Count Five of the indictment because of strategy—though he reached this conclusion solely on the suggestion of the AUSA, not trial counsel.

Petitioner filed a timely notice of appeal and application for a certificate of appealability with the district court. Judge Stewart ignored it. Petitioner later filed an application with the Tenth Circuit for COA. The Tenth Circuit denied it in violation of *Miller-El* by concluding that there was a failure to make a substantial showing of the

denial of a constitutional right and after admitting that they had no jurisdiction to decide the issues, went ahead and said that the attorney-client letter, whether or not admitted, wouldn't have made any difference—a conclusion they could not possibly have made without far more than a threshold inquiry into the facts, reading the transcript, etc.

This petition raises highly important questions pertaining to the reach or Remedial-*Booker*, which has been the subject of considerable debate, both in this Court and in the lower courts, and this Court's clarification would be a great aid to the lower courts in adjudicating the issues involved.

However, the primary questions are whether a COA should have been issued and whether the Tenth Circuit ought to have attempted to decide the issues without jurisdiction. Pursuant to Supreme Court Rule 14(h), Petitioner avers that the lower courts "entered a decision in conflict with the decision," not just of other circuits, rather, this Honorable Court; they decided "an important federal question" which calls for "an exercise of [its] supervisory power." The issues are not alleging "erroneous factual findings or the misapplication of properly stated rule[s]." This petition follows.

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit erred when it concluded that Petitioner had failed to make a substantial showing of the denial of a constitutional right; the right alleged to have been violated was the right to a jury trial for crimes which exposed him to far more than six months in prison.

Admittedly, the first consideration in granting a

certificate of appealability ("COA") is whether or not "the applicant has made a substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253(c)(2))

This is how Petitioner met this standard. His first ground for relief in his § 2255 was that the court exceeded its jurisdiction when it tried him without a jury for crimes which not only exposed him to more than six months in prison, but resulted in a sentence nearly twice what the statutory maximum was, as set forth below. Petitioner made a strong argument in his Motion and in his Application for a COA that he had been tried, found guilty and received as much as double the sentence prescribed for the conduct alleged in the indictment and found by the jury.

In the instant case, the jury found Petitioner guilty of evading $2.388 million in taxes. That's what the indictment alleged and he was found guilty. Judge Stewart's imposed sentence based on his findings of guilt on several other crimes, each a distinct offense, first of evading $1.212 million in taxes. This exposed Petitioner to up to five additional years in prison. (26 U.S.C. § 7201)

The lower court also found Petitioner guilty of violating 18 U.S.C. §1509 (obstruction of justice). That statute prescribes a maximum sentence of one year; however, this guilty finding outside the province of the judge exposed Petitioner to up to 44 months under the Guidelines and he received well over the one-year statutory maximum in § 1509.

But in *Lewis v United States*, 518 U.S. 322, 331, Justices Kennedy and Breyer, in their concurring opinion, stated that the right to a jury trial "attaches" whenever a defendant is charged with a serious crime, defined as one

exposing him to over six months in prison, regardless of the sentence actually imposed. Already it is evident that Petitioner's constitutional right to a jury trial was violated.

Justice Scalia, joined by Justices Souter and Ginsburg (concurring and dissenting) in *Neder v United States*, 527 U.S. 1, 30, said:

> "Article III, § 2, cl. 3, of the Constitution provides: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by jury....' The Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....' When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy."

From the above, it is clear that the lower courts denied Petitioner one of the most precious protections in the Constitution. Petitioner set forth far more than ample facts from the record and caselaw to support this ground. How was it then that the lower courts refused to even consider it and the Tenth Circuit said that he had failed to make a substantial showing of the denial of a constitutional right?

In *Miller-El*, 537 U.S. at 327, this Court said that "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues deserve encouragement to proceed further. *Slack, supra* at 484."

Petitioner quoted a plethora of cases in which "jurists

of reason" not only found the district court's resolution debatable, they outright disagreed with it. Additionally, many quotations showed that at the very least, the issue deserved encouragement to proceed further. Having satisfied the standard this Court set for this, consistent with the statute (28 U.S.C. § 2253), the lower courts ought to have certified this issue for appellate review. That would have enabled this Court to make a firm determination of a critical question which has divided this Court and virtually all the lower courts.

(a.) Part of the issue involved the question of what exactly is meant by the Supreme Court's use of the terms "advisory" and "statutory maximum" with regard to the federal Guidelines.

Jurists of reason within this Honorable Court have expressed different views on this question. On one extreme, Justice Alito, in his dissenting opinion in *Cunningham v California*, 166 L. Ed. 2d. 856, 881, said that "the *Booker* Court did not spell out in detail how sentencing judges are to proceed under the new advisory Guidelines regime." He added that in his opinion "it seems clear that this regime permits—and, indeed, requires—sentencing judges to make factual findings and to base their sentences on those findings."

At the other end of the issue, Justice Ginsburg, writing for the majority, said that "the Federal Constitution's jury-trial guarantee proscribes a ... judge to impose a sentence above the statutory maximum based on a fact ... not found by a jury." (*Id.*, at 864)

Yet another approach is suggested by Justices Kennedy and Breyer, in their dissenting opinion, opined (*Id.*,

at 878):

> "The system of guided discretion would be permitted to a large extent if the Court confined the *Apprendi* rule to sentencing enhancements based on the nature of the offense. These would include, for example, the fact that a weapon was used; violence was employed; a stated amount of drugs or other contraband was involved; or the crime was motivated by the victim's race, gender, or other status protected by the statute....
>
> "On the other hand, judicial determination is appropriate with regard to factors exhibited by the defendant. These would include, for example, prior convictions; cooperation or non-cooperation with law enforcement; remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community. This is so even if found by the judge by a preponderance of the evidence. These are facts that should be taken into account at sentencing but have little if any significance for whether the defendant committed the crime."

If the standard for the grant of a COA is that jurists of reason would or could find the way the lower court resolved the constitutional question, then the various views by the Honorable Justices on this Court leave no question that a COA ought to have issued, and considering the status of the jury-trial guarantee, appearing both in the Constitution and Bill of Rights, and the fact that this right "attaches" whenever a defendant is exposed to more than six months in prison, Petitioner respectfully suggests a solution which might resolve the "debatable" conclusions of Petitioner's judge.

If the judge must "take account of" the Guideline BOL before examining whether there are mitigating or aggravating factors which warrant a different sentence outside that BOL range, surely the BOL must be determined on facts found by the jury, not on crimes on which the judge by himself finds guilt. The jury trial guarantee is meaningless in the Guideline context if the suggested sentence is based upon crimes for which the defendant was denied a jury trial and which exposed him to more than six months in prison.

It is just as Justice Ginsburg explained in *Cunningham v California*, 166 L. Ed. 2d 856, 872:

> "Under the system described in Justice Breyer's opinion for the Court in *Booker*, judges would no longer be tied to the sentencing range indicated in the Guidelines. But they would be obliged to 'take account of' that range along with the sentencing goals Congress enumerated in the SRA at 18 U.S.C. § 3553(a), 543 U.S. at 259."

This comes very close to matching the middle ground set forth by Justices Kennedy and Breyer in their dissent in *Cunningham*, 166 L. Ed. 2d at 878, quoted above. They appear to agree that under the *Apprendi* ruling, judges wouldn't be able to find guilt on crimes not charged and not found by the jury but they would be able to find the factors set forth in mitigation or aggravation.

The judge would be prohibited from considering any allegation by the probation officer or the Government which alleged a greater quantity of drugs, money defrauded, taxes evaded, etc., when determining the final sentence—if such added charges exposed the defendant to more than six

months in prison.

The real problem is not the fact that the Guidelines are "advisory," rather it is the finding of guilt for crimes and facts not alleged and not proven to the jury and not admitted by the defendant. May the Court please reflect on how much work it and all of the lower courts are put to because sentences result from blindsiding a defendant with charges he never admitted and which the jury never found. But, if the Court was to just use the "serious crime" definition Justices Kennedy and Breyer used in *Lewis v United States* to determine whether the fact or alleged conduct in the "bureaucratically prepared, hearsay-riddled presentence reports" (*Booker*, 543 U.S. at 304) based on "facts extracted after trial from a report compiled by a probation officer the judge thinks more likely got it right than got it wrong," (*Blakely*, 542 U.S. at 312), the precious judicial resources of all the courts and those of the Department of Justice would be far better served.

Justice Ginsburg, in her majority opinion in *Cunningham*, used the expression "statutory maximum," as did the several opinions from *Apprendi* on, when stating that a sentencing judge could not impose a sentence "after finding additional facts," rather "*without* any additional findings." (*Id.*, at 865) Now, however, with the Guidelines only "advisory," what is that "statutory maximum"? In *R.L.C. v United States*, 117 L. Ed. 2d 559, 567, the Court said:

> "That statute [18 U.S.C. §3553(b)] provides that 'the court shall impose a sentence within the range' established for the category of offense as set forth in the Guidelines, 'unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

consideration by the Sentencing Commission..."'

The Eighth Circuit case of the same name (915 F.2d 320, 324) speaks of this as "the statutory maximum." However, § 3553(b) was deemed unconstitutional in Remedial-*Booker*. The proscription Justice Ginsburg spoke of in *Cunningham* means little in Guideline cases if there is no guidance from the Court as to what is meant by this expression in the current "Advisory" Guideline scheme. The Court's definition of this expression, or decision that it is inapplicable would be a great help in aiding the lower courts in sentencing issues.

In this context, it should be noted what Justice Stevens observed in *United States v Santos*, 170 L. Ed. 2d 912, 928: that if "a defendant has a significant criminal history or Guideline enhancements apply, the statutory cap of five years in § 1955 is an important limitation on a defendant's sentence." With this in mind, Petitioner draws the Court's attention to the fact that the statutory cap for his offenses was five years also and the only way that he received forty months longer than that was by reason of the district judge's usurpation of the power the Framers gave the jury in Article III, Section 2, Clause 3, and the Sixth Amendment.

In *Blakely*, 542 U.S. 296, 308, Justice Scalia said that "the Sixth Amendment...limits judicial power only to the extent that it infringes on the province of the jury." In BALLENTINE'S LAW DICTIONARY 1016 (3rd ed.) it defines "province of court and jury" thusly:

> "The separate and distinctive functions characteristic of a system of jurisprudence derived from common law, the province of the court being to

> determine and decide questions of law presented at the trial and to state the law to the jury, the province of the jury being to decide or determine the facts of the case from the evidence adduced, in accordance with the instructions given by the court."

In *Cunningham*, 166 L. Ed. 2d at 864, Justice Ginsburg spoke of "the judge's province." At 869, she spoke of the "domain of the jury," which obviously means the jury's province. In *Blakely*, 542 U.S. at 306, Justice Scalia said that "the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." He spoke of "the Framer's paradigm for criminal justice...[as] the common law ideal of limited state power accomplished by strict division of authority between judges and jury." (*Id.*, at 313)

In *Oregon v Ice*, 172 > Ed. 2d 517, 522, Justice Ginsburg said that "it is within the jury's province to determine any fact ... that increases the maximum punishment authorized for a particular offense." At 524 she spoke of "the jury's historic role as a bulwark between the State and the accused at trial for an alleged offense." At 526, she spoke of her holding, "in *Cunningham* that the facts permitting imposition of an elevated 'upper term' sentence for a particular crime fell within the jury's province."

These facts are all relevant to Petitioner's ground for relief in his § 2255. He stated that he was exposed to more than double the statutory maximum under the statutes he was accused of violating by the judge invading the province of the jury, usurping that power the Framers gave to the jury, and finding him guilty of uncharged crimes and aggravating alleged facts which exposed him to 121 months for the

alleged crimes with a statutory maximum of five years; then sentencing him to forty months over the statutory maximum, something the Framers never intended.

It is true that Article III, Section 2, Clause 1, gives "power" to the courts in cases or controversies involving, among other things, violations of federal criminal laws. However, that "power" is reserved to the jury in Clause 3. (*See, e.g., Blakely*, 542 U.S. at 305-306) ("the right of jury trial...is no mere procedural formality, but a fundamental *reservation of power* in our constitutional structure.") Hence, it could be said that Clause 1 giveth power, but Clause 3 taketh that power away, or limits it, in the case of criminal trials. It could well be said that the jurisdiction of the courts in criminal trials for serious crimes has two components: (1) The Clause 1 case in controversy, and Clause 3, jury trial or plea of guilt.

From the foregoing it is apparent that Petitioner has made a substantial showing of the denial of a constitutional right; therefore, the Tenth Circuit erred in their conclusion to the contrary. It is also apparent that there are a host of "jurists of reason" who would or have found the lower court's resolution of Petitioner's claims either "debatable" or "deserving of encouragement to proceed further." Thus, a certificate of appealability ought to have been issued certifying the issue of whether the district court exceeded his jurisdiction by going beyond the "power" granted to him in Article III, Section 2, Clause 1, which was limited in Clause 3 with respect to criminal trials.

The fact that there are jurists of reason who would find the way the district court decided Petitioner's first ground in his § 2255 debatable is well stated by Justice Souter in his dissenting opinion in *Rita*, 168 L. Ed. 2d at 235:

"Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point."

Examined, not just from the perspective of the Sixth Amendment, but also from Article III, Section 2, Clauses 1 and 3—which was not attempted in any of the *Apprendi* line of cases—also deserves encouragement to proceed further. At the least, the question of whether a court has the jurisdiction to try a defendant and find guilt and impose more than six months in prison, is a question of first impression in the Tenth Circuit. (*See, e.g., Houston v Lack*, 487 U.S. 266, 269) (citing without disfavor that a court could "issue a certificate of probable cause [now a certificate of appealability]...noting that the appeal presented a 'question of first impression' in the jurisdiction.")

It is unquestionable that this issue raises a concern which has been voiced by many jurists of reason and which the Court would do well to clarify for the lower courts. The Court would eliminate many of the appeals and post-conviction efforts which plug the dockets of the courts at all levels if it spoke clearly on this issue. Surely, this is an issue which deserves encouragement to proceed further.

Therefore, as to this issue, Petitioner asks the Court to certify this issue for appellate review in a COA:

A. Whether a judge exceeds his constitutional jurisdiction when he tries a defendant for a crime or aggravating fact which exposes him to more than six months in prison, finds him guilty on a preponderance of the evidence and then imposes a sentence which exceeds the statutory maximum?

As for the next issue and question, Petitioner avers:

2. The Tenth Circuit erred when it concluded that whether or not the jury saw the attorney-client protected letter, it wouldn't have made any difference, deciding this issue without jurisdiction and without examining the record.

In *Miller-El v Cockrell*, 537 U.S. 322, 327, this Court said: "[T]he court of appeals should limit its examination to a threshold inquiry into the underlying merit of [the] claims." If this "threshold inquiry" revealed that the applicant had failed to make a substantial showing of the denial of a constitutional right, or that there really was no issue which jurists of reason could debate, then the COA should be denied. After denying the COA, the jurisdiction of the court of appeals ceases. If "a court of appeals...decide[es] the merits of an appeal,...it is in essence deciding an appeal without jurisdiction." (*Id.*, at 336-337)

It is apparent in the decision of the Tenth Circuit in the appendix, that is was wrong to conclude that Petitioner had failed to make a substantial showing of the denial of a constitutional right. However, the court went on to state that "there is no reasonable probability that the outcome would have been different." (Appendix page A-4.) If the Tenth Circuit limited its inquiry to just the threshold, it could not conclude that there was no prejudice. To reach that conclusion, the court would have had to reach far deeper into the record and examine the transcript of the trial and see whether the jury reached their verdict, particularly, that Petitioner had not acted in good faith, due in large part to the content of the attorney-client protected letter. From the "threshold inquiry," the court could not have accurately reached that conclusion.

Hence, either of two things is present: (1) The lower court went far beyond the "threshold inquiry into the merit of [Petitioner's] claims," or, (2) it decided the issue without jurisdiction to do so. Petitioner avers that the error, whether for going beyond the threshold inquiry or for deciding without the jurisdiction to do so invalidates the conclusion it reached.

The Tenth Circuit and the district court both found (at trial and on direct appeal) that the letter at issue "was privileged." (Appendix Page E-2 of Attorney Corporan's Petition to this Court in Case No. 07-14) The Tenth Circuit admitted that appellate Attorney Corporan "fail[ed] to include the letter, the pretrial motions and memoranda, the hearing transcript, or the court's order." (Appendix Page E-3) The Tenth Circuit also admitted that Attorney Corporan erred by failing to allege that Petitioner had shown the letter to a second of his two top managers, Adam Passey (Appendix Page E-4), and said that that "constitutes an independent ground to uphold the district court's ruling." (*Id.*)

Attorney Corporan also failed to apprise the Tenth Circuit of the fact that both Adam Passey and Troy Powell were the two top managers for Petitioner. Under the rule of agency, a principal is required to reveal to his agents or employees any risk to them either physical or pecuniary. In the instant case, even beyond the fact that Powell was the one who first received the letter, then gave it to Petitioner—negating any objection as to his having seen it, which Corporan failed to note—both Passey and Powell, as top employees and managers of Petitioner's apartment complexes, and knowing that they were operated as UBOs and that taxes on the income was being treated as deferred, could well have incurred personal liability for conspiring with Petitioner to evade taxes, if true. Petitioner had an

obligation, therefore, to apprise them of the attorney's conclusions. He did so, not just so that they could witness what the attorney said when they met with him, but so that if they disagreed with Petitioner, they could act to protect themselves. It is apparent that they too disregarded the attorney's conclusions, just as did Petitioner, believing that he erred because he didn't even understand what a UBO was. They continued to serve in their top management positions for many years after this 1992 letter was seen by them and they witnessed what the attorney had said during the meeting they attended.

Petitioner raised this Ground in his § 2255 under ineffective assistance of counsel. The Tenth Circuit said that "even if the court was willing to assume that counsel's performance was somehow deficient,...[Petitioner] was not prejudiced, because there was no reasonable probability that the outcome would have been different." (Appendix page A-4) Could the Tenth Circuit really reach this conclusion with just a "threshold inquiry"? No, it would require a comprehensive examination of the record. But, if they did a full examination of the record, not only were they without jurisdiction to reach this conclusion, they erred.

Petitioner's trial was replete with testimony that showed he did rely upon his legal and tax professionals in reaching the conclusion that taxes on income from the UBOs was deferred. Testimony also showed that the IRS had even notified him when he applied for a tax identification number that none was needed for such a trust. He did, all in good faith, believe that he was acting legally—though at trial he found that he had been deceived and now understands that all income is taxable in the year earned and all taxes on income earned are now being paid. Hence, pursuant to this Court's decision in *Cheek v United States*, 498 U.S. 192, where this

Court dealt with the good faith defense to tax infractions, the Court concluded that it really didn't make any difference whether the jury believed that the belief of Cheek was reasonable in their mind, all that was needed was for them to conclude that Cheek believed he was not liable.

Under this standard, absent the highly prejudicial content of a letter from an attorney who expressed a different opinion, the jury would have had more than ample reason to believe that Petitioner, while having failed to report income from the UBOs which was taxable, did not do so because he honestly believed that he had no legal obligation to do so. The entire trial was infected due to this letter!

It would be necessary to fully brief this issue and for the Tenth Circuit to consider the record in detail in order to conclude that Petitioner was not prejudiced because it wouldn't have made any difference anyway. All that was appropriate for the Tenth Circuit was to see that even in its own decision in *Wade*, 203 Fed. Appx. 920, they saw that appellate counsel provided very seriously deficient assistance; then recognize that that serious error could well have had a direct bearing on the jury's conclusion that Petitioner failed to act in good faith.

Petitioner cited numerous opinions of jurists of reason who would have or had found differently in this matter, both in his § 2255 and in his application for a COA. There was no question that this presented a substantial denial of a constitutional right. The Tenth Circuit even referred to one of its decisions, that of *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006), in their decision in the direct appeal. That case admitted that "[t]he attorney-client privilege is 'the oldest of the privileges for confidential communications known to the common law.'

Upjohn Co. v United States, 449 U.S. 383, 389." So, the question was whether it was permissible for Petitioner to have made Powell and Passey aware of the letter, whether he should have included them in his meetings with the attorney.

Had the Tenth Circuit been properly provided with the record and had appellate counsel appraised the court of the fact that Powell received the letter before Petitioner did and that both he and Passey were top managers who had a right to know what the attorney said about the taxability of income from the UBOs, in fact whether they agreed with that attorney, as they were full aware of how Petitioner operated the apartment business through the UBOs, the outcome would have been different.

Petitioner asserts that both trial and appellate counsel were deficient in their performance. Trial counsel failed to apprise the judge that his conclusion that since Powell and Passey worked for the UBOs and not Petitioner, was clear error. The testimony in the in limine and *James* hearings had the prosecutor, the trial attorney, even the judge, speaking of them working for Petitioner, and both Powell and Passey repeatedly stated that they worked for Petitioner. Absent that error, it is a reasonable probability that the result of those two hearings would have been different and the jury would not have been infected with the attorney-client protected letter at all.

As for appellate counsel, she erred so grievously—even the Tenth Circuit observed her serious errors. There is no conceivable way that that court could conclude that even if the jury had not seen the letter Petitioner would still have been convicted—that is, if they only did a threshold inquiry. They had no jurisdiction to go beyond that threshold inquiry and decide the issue itself in the negative, as they did.

All that they were authorized by the statute and this Court's decision to do was to make a threshold inquiry as to whether those errors could reasonably have affected the course of the trial; whether the district court erred in concluding that such an issue procedurally barred. Obviously, it wasn't barred because this Court has opined that ineffective assistance claims can always be raised for the first time in collateral attacks. (*See Massaro v United States*, 538 U.S. 500, 509) ("ineffective-assistance-of-counsel claim[s]...[may be] brought in a[n]...appropriate proceeding under § 2255.") On the basis of the claims raised and the citation to jurists of reason who had concluded differently, the Tenth Circuit should have certified the following issue for appellate review, which this Court is now asked to do:

B. Whether the lower court erred in concluding that an obvious ineffective assistance claim was barred because the court of appeals had decided—due to the complete failure of appellate counsel—that there was no error in allowing an attorney-client protected letter to be introduced to the jury, resulting in infecting the entire trial?

3. Both the district and circuit courts erred in concluding that trial counsel failed to challenge Count Five due to some "strategy," as this conclusion was reached at the suggestion of the prosecutor, not trial counsel.

Lastly, the Tenth Circuit refused to grant a COA on the issue of ineffective assistance of counsel regarding the failure of trial counsel to challenge Count Five of the indictment and for appellate counsel's failure to recognize the error and raise it on direct appeal. The Tenth Circuit adopted the same reasoning as did the lower court that this

was due to strategy on the part of trial counsel. However, trial counsel did not advance this logic; it was advanced by the AUSA.

The indictment said in Count Five:

> "The factual allegations contained in paragraphs 1-21 of Count I of this Indictment are realleged and incorporated as if fully set forth herein.
>
> "From and during about 1992, the exact date being unknown to the Grand Jury, and continuing up to and including the date of this Indictment, in the Central Division of the District of Utah, defendants herein,
>
> STANLEY L. WADE and JANET B. WADE,
>
> residents of Salt Lake City, Utah, did willfully attempt to evade and defeat payment of a large part of the income tax due and owing by them to the United States of America **for the calendar years 1982 through 1984**, in an amount in excess of $1 million, and did aid and abet each other, **by forming** various UBOs to conceal their assets and income-production activities, knowing they had and would have outstanding income tax liabilities, and committing the other acts alleged in paragraphs 1-21 of Count I.
>
> "All in violation of title 26 United States Code, Section 7201, and title 18 United States Code, Section 2."

Essentially, the Government alleged that the purpose of forming the UBOs in 1992 was to evade payment of taxes

"for the calendar years 1982 through 1984." First of all, that's a stretch; it would be like trying to close the barn door after the horse got out.

Yet the real error is obvious when one looks at Count One. In Count One, the Government alleged that Petitioner and his wife had some forty different financial accounts for which they were the signers. These accounts had approximately $2 million in liquid assets. For all those years from 1992 on to the date of the indictment, all that cash was lying there and attachable by the IRS or anyone else with a claim. If the UBOs were formed to defeat payment of the taxes for 1982-1984 or any other years, but Petitioner took no steps to protect the millions of dollars in liquid assets in these various accounts—most of which were set up by brokers to maximize earnings and still maintain sufficient liquidity—it would make as much sense as a farmer building a huge storage vault to house his grain and then leaving piles of gold bars outside! Ludicrous!

However, trial counsel failed to recognize that Count One made it clear beyond doubt that Count Five was false on its face. Hence, he never made any attempt to defeat that Count, either before trial or in arguments and testimony during trial. Exacerbating trial counsel's clear error, appellate counsel also failed to recognize the fatal flaw in the indictment and she did not raise the issue on appeal.

Petitioner raised this in his § 2255, pointing out that this not only made Count Five erroneous and fatally flawed, it cast serious doubt on the entire case, insofar as the use of the UBOs to defeat taxes. It also cast doubt on the conspiracy claim and the aiding and abetting charge. Had trial counsel raised this defense, the entire proceeding would very reasonably have been different.

When Judge Stewart ordered the AUSA to Answer the motion, AUSA Loren Washburn came up with the idea that this was strategy on the part of trial counsel. AUSA Washburn said (on page 14 of his Answer): "Wade has failed to establish that, even assuming the validity and somewhat exonerating effect of the evidence, it would not have been a wise trial strategy for defense attorney to introduce evidence that would have proved Wade's guilt on counts six and eight." AUSA Washburn's logic, is that if Petitioner admitted that there was about $2 million in liquid assets, this would have proved him guilty of bankruptcy fraud.

First of all, it's not for the AUSA to determine what strategy was for trial counsel. If it was his belief that trial counsel made an intelligent choice—developed a trial strategy—to forego the introduction of the fatal flaw in the fifth Count of the indictment, that would be for trial counsel to state during an evidentiary hearing. Surely AUSA Washburn is not a psychic who can divine what trial counsel thought.

However, the point has no merit to begin with. If Petitioner believed that the assets of the UBOs—all the accounts for which he was a signer were in the names of UBOs—were no longer his personal property due to the way he and his wife structured their estate plan with these trusts, logically he would have believed that they were not subject to the bankruptcy court. He acted in good faith when he showed what he believed his personal assets were. Hence, there would be no "strategic" reason to ignore "the somewhat exonerating effect of the evidence" (AUSA Washburn's comment) and believe that this would somehow help Petitioner with regard to the bankruptcy Counts.

Even more poignant though, is that for trial counsel to

develop a strategy that caused him to not challenge the obvious and fatal flaw in Count Five in order to defend the bankruptcy Counts, he'd have to recognize the fatal flaw and develop the strategy AUSA Washburn ascribes to him.

Petitioner raised these arguments in his Reply to Washburn's Answer. But, Judge Stewart, without doing his mandated job of convening an evidentiary hearing to determine the veracity of AUSA Washburn's defense and hear it straight from the horse's mouth as to whether he refused to raise the defense to Count Five for strategy, simply adopted AUSA Washburn's excuse and denied the ground Petitioner raised.

Count One of the indictment, incorporated into Count Five, stated that Petitioner and his wife "opened more than forty bank accounts with signature authority in their own names or nominees. Rent from the apartments was deposited and transferred to these accounts, under control of the defendants."

In his application for a COA, Petitioner cited *Cooks v Ward*, 169 F.3d 1283, 1295 (10th Cir. 1998), where the court said that "we cannot help but conclude counsel failed to satisfy his 'duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary.'" (Quoting *Strickland v Washington*, 466 U.S. at 691.) In *Mayes v Gibson* 210 F.3d 1284, 1289-1290 (10th Cir. 2000), the court said that "the absence of an evidentiary hearing" "stymied" them from determining whether there was any strategy in the attorney's failure to do adequate investigations. Then they cited a portion of that court's decision in *United States v Cronic*, 839 F.2d 1401, 1404 (10th Cir. 1988) where they said that "[a]n attorney's decisions must be based on an adequate knowledge

of the facts."

In the same way, trial counsel's determination to not use the "somewhat exonerating effect of the evidence" (AUSA Washburn's words) could not really be determined without hearing from the attorney and having him explain why he didn't raise that challenge. The Tenth Circuit was "stymied" by the failure of the lower court to convene an evidentiary hearing to explore this issue. They ought to have granted a COA, but didn't.

Hence, even within the Tenth Circuit there are "jurists of reason" who would find Judge Stewart's decision to presume strategy without even hearing from the trial attorney, debatable. They ought to have certified the issue for appellate review.

In support of the prejudice prong of *Strickland*, Petitioner raised the fact that the entire case of the Government was premised upon Petitioner's formation of the UBOs to defeat taxation. If Count Five was deleted or defeated, this claim would lack merit. The fact, clearly set forth in Count One that Petitioner had millions of dollars in back accounts under his signature, would make it clear that the UBOs were not set up to defeat the tax. Yes, Petitioner, on advice of his tax and legal experts who understood what UBOs were—to the contrary of the attorney who drafted the letter, who didn't even understand what they were—in complete good faith believed that the UBOs deferred the taxes, but the fact that he had all that money in accounts with his signature showed that he wasn't trying to protect his assets from the IRS being able to obtain money for the taxes.

This is a critical part of the strategy trial counsel ought to have focused on. The UBOs weren't to shield assets,

both real and liquid, from the IRS. If that had been the case, he wouldn't have left so much money around available to the IRS to attach. Had counsel done a proper job of investigating and had he realized that Count One defeated not only Count Five, but cast a very strong shadow on the entire case of the government, he would have raised the fatal flaw in the indictment and developed a strategy far different from that he employed. The entire proceeding would have been cast in a different light had trial counsel not completely missed the ball in this respect.

But, whatever the case, there were certainly issues and questions that shouldn't have been answered by Judge Stewart's adoption of AUSA Washburn's *presumption* that trial counsel had some sort of strategy in mind when he failed to use one of the strongest defenses available. At the very least, if counsel had provided effective assistance in this matter, Petitioner would have been acquitted on Count Five or the Count would have been deleted before trial or before jury deliberations. This would have saved Petitioner over $2 million dollars in penalties and interest on the paltry small amount of allegedly unpaid taxes for 1982-1984. That, all by itself, is serious prejudice.

For this reason, Petitioner respectfully asks this Court to certify this issue for appellate review:

C. Whether the lower court erred in concluding that trial counsel's clear error in failing to recognize and challenge the validity of Count Five solely on the strength of the AUSA's suggestion that it was strategy and whether the lower court erred in failing to convene an evidentiary hearing?

CONCLUSION

The Tenth Circuit violated this Court's clear instructions in *Miller-El*, by denying the COA, then determining issues on their merits without jurisdiction, determination that could not have been made without a complete examination of the record.

The Tenth Circuit erred in finding that a judge can do whatever he wants under the "advisory" nature of the Guidelines, even though Petitioner was found guilty of crimes which exposed him to greater than six months in prison, all without a jury, in violation of the Sixth Amendment and Article III, Section 2, Clause 3. The judge did not have the jurisdiction to try Petitioner for these crimes because the right to a jury trial "attaches" whenever a defendant is accused of a crime with exposes him to more than six months. Petitioner was exposed to more than double the statutory maximum sentence under 26 U.S.C. § 7201 and he received a sentence forty months longer than the maximum due to the judge's trial and finding guilt on uncharged crimes.

The issues raised in Petitioner's § 2255 Motion were shown to be such that "jurists of reason" would easily find the way Judge Stewart determined Petitioner's Sixth Amendment constitutional rights debatable, or that they deserved encouragement to proceed further.

RELIEF REQUESTED

Petitioner Respectfully prays the Court will remand this matter back to the Tenth Circuit Court of Appeals, requesting that they consider the issues raised herein and allow full briefing by Petitioner and the Government, and for

such other and further relief as the Court deems just and equitable.

By executing this Petition this 20th day of November, 2009, Petitioner declares that the statements herein are true under penalty of perjury pursuant to 28 U.S.C. § 1746.

/S/ Stanley L. Wade
Petitioner

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff — Appellee, v. STANLEY L. WADE, Defendant - Appellant.	No. 09-4063 (D.C. Nos. 2:08-CV-741-TS and 2:04-CR-141-TS) (D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY[1]

Before **KELLY**, **BRISCOE** and **HOLMES**, Circuit Judges.

[1] This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1. After examining the appellate record, Petitioner's application for a certificate of appealability, and other filings, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this matter. *See* Fed. R. App. P. 34(a). The case is therefore ordered submitted without oral argument.

Petitioner-Appellant Stanley L. Wade seeks to appeal from the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Mr. Wade claims that the district court exceeded its jurisdiction by sentencing him based on facts that were not found by the jury. He also claims that his attorney provided ineffective assistance of counsel. The district court denied all of Mr. Wade's claims on the merits. Affording solicitous construction to Mr. Wade's pro se filings, *see Van Deelen v. Johnson*, 497 F.3d 1151 n.1 (10th Cir. 2007), we find that no reasonable jurist could conclude that the district court's ruling was in error. We therefore deny his request for a certificate of appealability (COA) and dismiss his appeal.

BACKGROUND

Mr. Wade was convicted by a jury on seven counts of tax evasion and bankruptcy fraud. He was sentenced to 100 month's imprisonment followed by three years of supervised release. He was also assessed a fine of $125,000. A previous panel of this court affirmed Mr. Wade's conviction and sentence. *See United States v Wade*, 203 F. App'x 920 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 532 (2007).

Mr. Wade then filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. He claimed that the district court impermissibly based his sentence on factual findings that were not made by the jury—a claim that he also had raised on direct appeal. He further claimed that he received ineffective assistance of counsel. First, Mr. Wade claims that counsel's efforts to challenge the admissibility of a letter written by Mr. Wade's attorney (the "Black letter") were insufficient. Second, he

claims that counsel failed to object to the jury instruction on willfulness. *See Cheek v United States*, 498 U.S. 192 (1991). Third, Mr. Wade claims that counsel should have argued that Count V of the indictment was "preposterous" and "proven false in the indictment itself." Application for COA, Attach. At 9-10 (filed June 8, 2009). The district court denied the motion in a thorough, well-reasoned decision. R., Vol. I, Doc. 13 (Mem. Decision & Order, filed Feb. 18, 2009). Mr. Wade has now filed both an application for COA and a brief on the merits.

DISCUSSION

A COA is a jurisdictional prerequisite to an appeal from the denial of a § 2255 motion. *Miller-El v. Cockrell*, 537 U.S. 322, 335-35 (2003); 28 U.S.C. § 2253(c)(1)(B). We may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The applicant must demonstrate that "reasonable jurists could debate whether...the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted); *see Coppage v. McKune*, 534 F.3d 1279, 1281 (10th Cir. 2008).

Mr. Wade's first argument—that any facts affecting his sentence must be found by a jury—is entirely without merit. In fact, we rejected this argument on direct appeal. As we explained then, after *United States v. Booker*, 543 U.S. 220 (2005), "judicial fact-finding is entirely permissible as long as the guidelines are not applied as mandatory." *Wade*, 203 F. App'x at 936 (citing *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005)) The district court was correct to reject this claim, *inter alia*, because we have

previously considered and disposed of these issues on direct appeal. *See e.g., United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994) ("As to Defendant's remaining issues...we have previously considered and disposed of these issues on direct appeal. Therefore, Defendant may not raise these issues under § 2255." (citations omitted)). No reasonable jurist would debate the propriety of this resolution.

The district court was also correct to deny Mr. Wade's claims of ineffective assistance of counsel. Claims of ineffective assistance of counsel are evaluated under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Mr. Wade must establish "that counsel's performance fell below an objective standard of reasonableness as measured against prevailing professional norms, and he must show that there is a reasonable probability that the outcome would have been different but for counsel's inadequate performance." *Sandoval v. Ulibarri*, 548 F.3d 902, 909 (10th Cir. 2008) *petition for cert. filed* __ U.S.L.W.__(U.S. Apr. 27, 2009)(No. 08-10772), *see Strickland*, 466 U.S. at 688, 694.

With respect to the Black letter, the district court found that counsel challenged the admissibility of the letter both at trial and on appeal. R., Vol. I, Doc. 13, at 6-7. Moreover, even if the court was willing to assume that counsel's performance was somehow deficient, it concluded that Mr. Wade was not prejudiced, because there was no reasonable probability that the outcome would have been different. *Id.* at 7. With respect to the jury instruction, the court found that the instruction correctly stated the applicable law and that, therefore, counsel was not ineffective in failing to object to it. *Id.* at 10. With respect to Count V, the court found that Mr. Wade's proposed "defense" did not negate any of the elements of the offense. Worse, had counsel adopted

Mr. Wade's suggested strategy, it could have undermined his defense as to Counts VI and VIII. *Id.* at 12.

Having thoroughly reviewed Mr. Wade's application for a COA, his merits brief, and the appellate record, we agree, for substantially the same reasons given by the district court, that counsel was not ineffective. Therefore, Mr. Wade has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

CONCLUSION

For the foregoing reasons, we **DENY** Mr. Wade's application for a COA and **DISMISS** his appeal.

Entered for the Court
Jerome A. Holmes
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
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Denver, Colorado 80257
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Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deuty Clerk

August 18, 2009

Mr. Stanley L. Wade
USP - Florence ADMAX Satellite Camp
P.O. Box 5000
Florence, CO 81226
#02662-081

RE: 09-4063, Wade v. United States
Dist/Ag docket: 2:08-CV-00741-TS, 2:04-CR-00141-TS-1

Dear Counsel:

Enclosed is a copy of a final order dismissing the appeal entered today in the captioned case.

Please contact this office if you have questions.

Sincerely,

/S/ Elisabeth A. Shumaker
Clerk of Court

cc: Elizabethanne Claire Stevens
D. Loren Washburn

EAS/lab

IN THE UNITED STATES COURT FOR THE
DISTRICT OF UTAH
CENTRAL DIVISION

STANLEY L. WADE, Petitioner, vs, UNITED STATES OF AMERICA, Respondant.	MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 AND DENYING REMAINING MOTIONS AS MOOT Civil Case No. 2:08-CV-741-TS Criminal Case No. 2:04-CR-141-TS

This matter is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255 (the "§ 2255 Motion").[2] Petitioner is

[2] Case No. 2:08-CV-741 TS, Docket No. 1.

proceeding *pro se* in this matter. Having considered the pleadings and the record before it, the Court finds that all of Petitioner's arguments, and their underlying bases, do not establish appropriate grounds upon which to justify relief under § 2255. Based upon the reasons set forth more fully below, the Court will deny the § 2255 Motion and dismiss this case. As a result, Petitioner's remaining Motions[3] are moot.

I. BACKGROUND

On March 10, 2004, Petitioner, along with his wife, was indicted on a nine-count Indictment.[4] Petitioner was charged with seven counts of tax and bankruptcy-related offenses.

On March 10, 2005, Petitioner proceeded to trial. On March 21, 2005, the jury returned a guilty verdict against Petitioner on all counts. Petitioner was sentenced on June 22, 2005, to a term of 100 months imprisonment to be followed by 36 months of supervised release.

Petitioner filed a direct appeal. On appeal, Petitioner raised various arguments, including that the attorney-client privilege was violated when a letter written to him by his attorney, David Black (the "Black letter"), was introduced into evidence, and that the Court improperly sentenced him on the basis of acts not found by the jury. Defendant's conviction and sentence were affirmed by the Tenth Circuit Court of Appeals.[5]

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[3] Case No. 2:08-CV-741 TS, Docket Nos. 4, 5, and 11.

[4] Case No. 2:08-CV-741 TS, Docket No. 1

[5] *United States v Wade*, 203 Fed Appx. 920 (10th Cir. 2006)

Petitioner petitioned the United States Supreme Court for a writ of certiorari, which was denied. Petitioner then petitioned for a rehearing on his motion for a writ of certiorari, which was also denied.

Petitioner filed the instant Motion on September 26, 2008. The government was ordered to respond, which it did on November 19, 2008. Petitioner filed his Reply on January 5, 2009.

II. DISCUSSION

Petitioner raises the following arguments in his § 2255 Motion: (1) the Court exceeded its jurisdiction when it imposed a sentence greater than it had the authority to impose; (2) ineffective assistance of counsel for failure to object to the Court's clear error in relation to the Black letter; (3) ineffective assistance of counsel for failure to object to the jury instructions on willfulness; and (4) ineffective assistance of counsel for failure to develop a sound defense to Count V. In addition, Petitioner has filed two Motions seeking release pending the disposition of his § 2255 Motion[6] and a Motion[7] seeking relief from the Court's prior Order[8] denying Petitioner's Motion for Default. As a result of the Court's consideration of Petitioner's § 2255 Motion, the Court need not address these remaining Motions and they will be dismissed as moot.

A. PETITIONER'S SENTENCE

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[6] Case No. 2:08-CV-741 TS, Docket Nos. 4 and 5.

[7] Case No. 2:08-CV-741 TS, Docket No. 11.

[8] Case No. 2:08-CV-741 TS, Docket No. 9

Petitioner first argues that the Court exceeded its jurisdiction when it sentenced Petitioner. In particular, Petitioner argues that the Court acted outside the scope of its authority when it sentenced Petitioner based on factual findings not made by the jury.

Petitioner made this argument before the Tenth Circuit. In rejecting it, that court stated:

> "Mr. Wade also asserts that the district court calculated his sentence based upon factual findings not made by the jury in violation of *Blakely v Washington*. Under *Booker*, judicial factfinding is entirely permissible as long as the guidelines are not applied as mandatory. Here, the district court properly recognized that the guidelines are advisory, so no constitutional violation occurred.[9]

Petitioner attempts to distinguish his argument now from the argument made on direct appeal. Petitioner argues that the Court acted outside its jurisdiction by imposing the sentence it did. However, Petitioner's attempt to distinguish his argument from the one made on direct appeal is unavailing because Petitioner's objection remains the same—that the Court erred in calculating his sentence based on facts not found by the jury. This is the precise issue that Petitioner raised on direct appeal. Because the issue raised by Petitioner concerning his sentence have been considered and disposed of on direct appeal, Petitioner may not raise the issue in the instant Motion.[10] If Petitioner is correct in

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[9] Wade, 203 Fed.Appx. 920, 935-36 (citations omitted)

[10] *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994)(holding that district court did not err in dismissing claims in a § 2255 motion when those claims had previously

asserting that this is a new issue, not raised on direct appeal, the Court finds it to be procedurally barred.[11]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues that his counsel was ineffective for three reasons: (1) for failing to object to the Court's clear error in relation to the Black letter; (2) for failing to object to the jury instructions on willfulness; and (3) for failing to develop a sound defense to Count V.

The Supreme Court has set forth a two-pronged test to guide the court in making a determination of ineffectiveness of counsel. "To demonstrate ineffectiveness of counsel, [Petitioner] must generally show that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance was prejudicial."[12]

To successfully claim ineffective assistance then, Petitioner must show two things: First, that Counsel

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been brought and disposed of on direct appeal); *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989)("Absent an intervening change in the law of a circuit, issues disposed of on direct appeal generally will not be considered on a collateral attack by a motion pursuant to § 2255.)

[11] *United States v. Cox*, 83 F.3d 336, 341 (10th Cir. 1996)(stating that if an issue is not raised on direct appeal, petitioner "is barred from raising the issue in a § 2255 motion proceeding, unless he establishes either cause excusing the procedural default and prejudice resulting [from] the error or a fundamental miscarriage of justice [if] the claim is not considered").

[12] *United States v. Lopez*, 100 F.3d 113, 117 (10th Cir. 1996)(citing *Strickland v. Washington*, 466 U.S. 668 (1984))

functioned deficiently.[13] "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[14] Second, he must show that Counsel's deficient functioning prejudiced Petitioner's defense.[15] "This requires showing that counsel's errors were so serious as to deprive [Petitioner] of a fair [proceeding],...whose result is reliable."[16] Without both of these showings, Petitioner may not prevail in arguing that his conviction "resulted from a breakdown in the adversary process that renders the result unreliable."[17]

A Court is to review Petitioner's ineffective assistance of counsel claim from the perspective of his counsel at the time he or she rendered the legal services, not in hindsight.[18] In addition, in evaluating counsel's performance, the focus is not what is prudent or appropriate, but only what is constitutionally compelled.[19] Finally, there is "a strong presumption that counsel provided effective assistance, and a section 2255 defendant has the burden of proof to overcome that presumption."[20]

1. The Black Letter

Petitioner first argues that counsel was ineffective for failing to object to the Court's clear error in relation to the

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[13] *Strickland*, 466 U.S. at 687

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Hickman v. Spears*, 160 F.3d 1269, 1273 (10th Cir. 1998).

[19] *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984).

[20] *United States v. Kennedy*, 225 F.3d 1187, 1197 (10th Cir. 2002).

Black letter. The Court must begin by noting that counsel, both in this Court and on direct appeal, did object to the introduction of the Black letter. The Black letter was the subject of extensive briefing in this Court[21] and was the subject of considerable discussion in the Tenth Circuit's decision.[22] Therefore, for the same reasons stated above with respect to Petitioner's sentencing claim, this argument is likely barred.[23]

Turning to the merits of Petitioner's argument, Petitioner argues that his counsel was ineffective for failing to object to the Court's conclusion that neither Mr. Passey nor Mr. Powell were employees of Petitioner, but were instead employees of the Unincorporated Business Organizations ("UBOs"). Even if Petitioner's argument is correct—that both Mr. Passey and Mr. Powell were his employees—the outcome would not be different.

As was noted by this Court, Petitioner showed Mr. Passey the Black letter out of frustration, rather than a need for Mr. Passey to know about the letter and its contents. And as the Tenth Circuit stated:

> Mr. Passey testified that anytime Mr. Wade met with his attorneys, he wanted a witness. Mr. Passey's role as a witness, however, had nothing to do with facilitating the attorney-client communications about the UBOs. Thus, Mr. Wade's disclosure of the letter in the process of venting about the quality of the

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[21] Case No. 2:04-CR-141 TS, Docket Nos. 86, 90, 112, and 231.

[22] *Wade*, 203 Fed.Appx. at 923-24.

[23] *Warner*,23 F.3d at 291; *Prichard*, 875 F.2d at 791.

> advice he received (and its expense) had no connection with any responsibilities Mr. Passey had to the Wades individually.[24]

The above passage shows that even if Mr. Passey did work for Petitioner, Petitioner's disclosure of the Black letter to Mr. Passey had no connection to his responsibilities. Thus the privilege was waived regardless of who employed Mr. Passey.[25] Because Petitioner has not shown that the result would have been different if this Court or the Tenth Circuit found that Mr. Passey was Petitioner's employee, Petitioner cannot meet the second prong of the ineffective assistance test.

Petitioner also complains that his counsel on appeal was ineffective for failing to provided the Tenth Circuit Court of Appeals with the proper information to address this issue. It is true that, on appeal, the government argued that Petitioner had waived the argument relating to the Black letter "by failing to include in the record the letter, the pretrial motions and memoranda, the hearing transcript, or the court's order."[26] However, The Tenth Circuit chose to review the issue because the government had provided a sufficient basis on which to decide the issue.[27] Further, as discussed above, Petitioner has failed to show how he was prejudiced because the result would have been the same if the Tenth Circuit considered both Powell and Passey to be his personal

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[24] *Wade*, 203 Fed Appx. at 924 (citations omitted).

[25] *See Diversified Indus., Inc. v. Meredith*, 572 F 2d 596, 610 (8th Cir. 1977)(stating that in order for employee communication to be protected by the attorney-client privilege the subject matter of the communication must be within the scope of the employee's corporate duties).

[26] *Id.* at 924 n.1.

[27] *Id.*

employees.

Based on the above, the Court finds that even if Petitioner's counsel's performance was deficient, the Court cannot find that the deficient performance was prejudicial.

2. Jury Instructions

Petitioner next argues that his counsel was ineffective for failing to object to the jury instructions on willfulness and for failing to insist upon an appropriate willfulness instruction under *Cheek v. United States*,[28] In *Cheek*, the Supreme Court addressed the statutory definition of "willful" as it is applied in the tax code. The Court held its cases "conclusively establish that the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'"[29] The Tenth Circuit, in *United States v. Girdy*,[30] approved of a jury instruction which stated: "For the purposes of this instruction, the term 'willfully' means to voluntarily and intentionally violate a known legal duty."[31] The Court upheld the use of that jury instruction finding that it "clearly stated the correct legal standard."[32]

Here, the Court employed the following instructions:

INSTRUCTION NO. 37

The fourth element of the offense of tax evasion charged in Counts Two, Three, Four, and

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[28] 498 U.S. 192 (1991).

[29] *Id.* at 200-01 (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973)).

[30] 199 F.3d 1150 (10th Cir. 1999).

[31] *Id.* at 1156.

[32] *Id.*

Five is willfulness. To find the Defendant guilty of violating Section 7201, you must not only find that he committed some affirmative act of evasion, but you must also find that the act or acts were done willfully by him.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the Defendant must have acted voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with a purpose either to disobey or to disregard the law. If the government proves the Defendant knew of his legal duty to file true and correct tax returns, and that he voluntarily and intentionally violated that duty, then you may find he acted willfully.

A good faith belief is one which is honestly and genuinely held. It is for you to decide whether the Defendant acted in good faith or whether he willfully filed false income tax returns. In making this determination, you may consider all of the evidence received in this case which bears on the Defendant's state of mind.

INSTRUCTION NO. 37 A

The Defendant's conduct is not willful if you find that he failed to pay his income taxes because of negligence, inadvertence, accident, or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

INSTRUCTION NO. 37 B

> When the word "knowingly" is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the Defendant cannot be established merely by demonstrating that the Defendant was negligent, careless, or foolish, knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact. Knowledge can be inferred if the Defendant was aware of a high probability of the existence of a legal duty to pay income taxes on money generated by the apartment complexes held by the UBOs, unless the Defendant did not actually believe he had a legal duty to pay income taxes on money generated by the apartment complexes held by the UBOs.[33]

Jury Instruction No. 37 closely tracks the language of *Cheek* by stating: "The word 'willfully,' as used in this statute, means a voluntary, intentional violation of a known legal duty." The instructions then go further to explain that Petitioner's conduct would not be willful if the jury finds that "he failed to pay his income taxes because of negligence, inadvertence, accident or reckless disregard for the requirements of the law." Similar language was approved of in *United States v. Winchell*,[34] but not required by *Guidry*.[35]

Petitioner argues that his trial counsel was ineffective

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[33] Case No. 2:04-CR-141 TS, Docket No. 242, Instruction Nos. 37-37B.

[34] 129 F.3d 1093, 1096-97 (10th Cir 1997)

[35] 199 F.3d at 1156 ("Concluding the language at issue in *Winchell* was adequate is a far cry from deeming it necessary.")

for failing to request a more detailed good faith instruction. However, as set forth above, Instruction 37A clearly stated that Petitioner's "conduct is not willful if you find that he failed to pay his income taxes...due to his good faith misunderstanding of the requirements of law."[36] Additionally, Instruction 37 defined a good faith belief as "one which is honestly and genuinely held."[37] The Court further instructed the jury: "It is for you to decide whether the Defendant acted in good faith or whether he willfully filed false income tax returns. In making this determination, you may consider all of the evidence received in this case which bears on the Defendant's state of mind."[38] Because the instructions contained a good faith instruction and good faith was adequately explained in the instructions, the Court cannot find that Petitioner's counsel was ineffective for failing to object to it. Nor can the Court find that Petitioner was prejudiced by any failure to object. Further, the Court cannot find that Petitioner's appellate counsel was ineffective for failing to challenge these instructions on appeal.

3. Count V

Petitioner was charged in Count V with evading the payment of taxes owed for the years 1982 to 1984 in violation of 26 U.S.C. § 7201. Petitioner argues that his counsel was ineffective for failing to develop an adequate defense to this count. In particular, Petitioner claims that his counsel should have introduced evidence that Petitioner and his wife "had liquid and attachable assets in their own names exceeding $2,000,000 which remained...liquid and attachable

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[36] Case No. 2:04-CR-141 TS, Docket No. 242, Instruction No. 37A.
[37] *Id.* Instruction No. 37
[38] *Id.*

until time of trial."[39]

Count V charged Defendant, and his wife, as follows:

> "From and during about 1992, the exact date being unknown to the Grand Jury, and continuing up to and including the date of this Indictment, in the Central Division of the District of Utah, defendants herein,
>
> STANLEY L. WADE and JANET B. WADE,
>
> residents of Salt Lake City, Utah, did willfully attempt to evade and defeat payment of a large part of the income tax due and owing by them to the United States of America for the calendar years 1982 through 1984, in an amount in excess of $1million, and did aid and abet each other, by forming various UBOs to conceal their assets and income-production activities, knowing they had and would have outstanding income tax liabilities, and committing the other acts alleged in paragraphs 1-21of Count I.
>
> "All in violation of title 26 United States Code, Section 7201, and title 18 United States Code, Section 2."[40]

The Court explained that in order to find Petitioner guilty on this Count, the jury must be convinced that the government has proved each of the following beyond a

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[39] Case No. 2:08-CV-741 TS, Docket No. 2, at 38.

[40] Case No. 2:04-CR-141 TS, Docket No. 1, at 9-10.

reasonable doubt: (1) the Petitioner owed substantial income tax for the years 1982 through 1984; (2) the Petitioner intended to evade and defeat payment of those taxes; (3) the Petitioner committed an affirmative act in furtherance of his intent to evade and defeat payment of his income taxes after March 10, 1998; and (4) the Petitioner acted willfully, that is, with the voluntary intent to violate a known legal duty.[41]

Petitioner argues that his counsel was ineffective for failing to argue that Petitioner did not create the UBOs to conceal his assets, but rather had liquid assets available. However, the fact that Petitioner may have had liquid assets available to the IRS does not constitute a defense to tax evasion. Indeed, as the government points out, such evidence would provide direct evidence that Petitioner made false statements on his bankruptcy petition as alleged in Counts VI and VIII of the Indictment. Because of this, the Court cannot find that Petitioner's counsel's performance fell below an objective standard of reasonableness by failing to raise this as a defense. Similarly, the Court cannot find that appellate counsel's performance was deficient for failing to raise this issue on appeal.

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[41] *Id.* Docket No. 242, Instruction No. 30.

III. CONCLUSION

It is therefore

ORDERED that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 1 in Case No. 2:08-CV-741 TS) is DENIED. It is further

ORDERED that Petitioner's remaining Motions (Docket Nos. 4, 5, and 11) are DENIED AS MOOT. It is further

ORDERED that, pursuant to Rule 8(a) of the Rules Governing § 2255 Cases, an evidentiary hearing is not required.

The clerk of the court is directed to close this case forthwith.

DATED February 18, 2009

BY THE COURT
/S/ TED STEWART
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. STANLEY L. WADE, Defendant - Appellant.	No. 09-4063 (D.C. Nos. 2:08-CV-741 TS and 2:04-CR-141 TS)

ORDER

Before **KELLY**, **BRISCOE**, and **HOLMES**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court,

/S/ Elisabeth A Shumaker
ELISABETH A.
SHUMAKER,
Clerk

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

STANLEY L. WADE, Petitioner, vs. UNITED STATES OF AMERICA, Respondant.	MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S MOTION TO RECONSIDER Civil Case No. 2:08-CV-741 TS Criminal Case No. 2:04-CR-141 TS

This matter is before the Court on Petitioner's Motion to Reconsider.[42] In his Motion to Reconsider, Petitioner reargues the points addressed by the Court in its February 18, 2009 Order.[43] For the same reasons set forth in that Order, Petitioner's Motion to Reconsider is denied.[44]

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[42] Docket No. 15.

[43] Docket No. 15.

[44] See Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000)(stating that motion for reconsideration "is not appropriate to revisit issues already addressed").

It is therefore

ORDERED that Petitioner's Motion to Reconsider (Docket No. 15) is DENIED. It is further

ORDERED that Petitioner's Motion for Release (Docket No. 14) and Petitioner's Motion for Judicial Notice (Docket No. 16) are DENIED AS MOOT.

DATED this 23rd day of March 2009.

BY THE COURT
/S/ TED STEWART
United States District Judge

The parties are familiar with the facts, and we need not restate them here. Instead we will describe only the facts crucial to our decision on each alleged error.

Discussion

1. [**4] The Attorney-Client Privilege

Mr. Wade first argues that the district court erred by permitting the government to introduce a letter written by his attorney, David Black, addressing the legality of using UBOs to shield the income generated by the Wades' apartment complexes from federal taxes. This letter advised that there was "no exemption from reporting or taxation in general that applies to a UBO" and that the IRS was likely to prosecute if the Wades persisted in failing to report income from the properties nominally held by their UBOs. I Aplee. Supp. App. at 27.

In the district court, Mr. Wade sought to bar the government from presenting any evidence about the letter, arguing that it was covered by the attorney-client privilege. At the suppression hearing, the government offered the testimony of the Wades' nephew, Adam Passey, and Troy Powell, who assisted Mr. Wade in managing the apartment buildings. Both witnesses testified that Mr. Wade had shown them the letter. See III Aplee. Supp. App. at 457, 476.

The district court found that "Mr. and Mrs. Wade, in their individual capacities, were Mr. Black's clients." Id. at 491. It then addressed the disclosure of the [**5] attorney-client communication, finding that:

> Mr. Wade disclosed the letter both to Mr. Passey and Mr. Powell. Neither Passey nor Powell were employees of Mr. Wade, but rather the UBOs...Mr. Wade did not need to disclose the contents of the letter in order to ask Mr. Powell to resolve the billing dispute...Mr. Wade's disclosure to Mr. Passey was motivated more by his frustration with the contents of the letter rather than a need for Mr. Passey to know about the letter and its contents...Mr. Passey and Mr. Powell were third parties to the attorney/client relationship between Mr. Black and Mr. and Mrs. Wade.

[*924] Id. at 491-92. The court concluded that the letter was privileged but Mr. Wade waived the privilege by disclosing it to Mr. Passey and Mr. Powell. Id. at 492.

We "review a district court's determinations regarding waiver of attorney-client privilege and work-product protection for abuse of discretion. In doing so, however, we review the district court's underlying factual findings for clear error, and its rulings on purely legal questions de novo." *Thiessen v. Gen. Elec. Capital Corp.,267 F.3d 1095, 1112 (10th Cir. 2001)*[**6] (citations omitted). n1

n1 The government asserts that Mr. Wade has waived this argument by failing to include in the record "the letter, the pretrial motions and memoranda, the hearing transcript, or the court's order." Aplee. Br. at 33. We ordinarily will not review a decision, even for plain error, where the "relevant portions of the transcript of the trial proceedings are not part of the record on appeal." *United States v. Davis, 60 F3d 1479, 1481 (10th Cir. 1995)*. Here, however, we elect to review it because the materials provided by the goverment provide a sufficient basis on which to decide the issue.

The law governing the waiver of the attorney-client privilege provides that "[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party." *United States v. Ryans, 903 F.2d 731, 741 n.13 (10th Cir 1990)*. Mr Wade contends that he did not waive the privilege by disclosing the letter to Mr. Powell [**7] because "Powell testified that he played an important role in the Defendant's business and that Defendant gave him a copy of the opinion letter as part of his work." Aplt. Br. at 3. He further contends that Mr. Powell was present during discussions with the attorney and had been instructed to communicate with the attorney about the UBOs. Aplt. Br. at 11. Mr. Wade relies upon *Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977)*, which addressed the extent to which a corporate employee's communications with counsel are protected by the attorney-client privilege.

We have noted that the attorney-client privilege facilitates the client's need for advice and the attorney's need for complete information in rendering that advice. *In re Qwest Communs. Int'l, 450 F.3d 1179, 1185 (10th Cir. 2006).* Here, the clients were Mr. and Mrs. Wade, and the opinion letter was drafted at Mrs. Wade's urging. Mr. Powell and Mr Passey both testified that Mr. Wade talked with them about the UBOs and how he could avoid paying taxes. III Aplee. Supp. App. at 452, 474. Even were we to accept that Mr. Powell assisted Mr. Wade in his ventures and that [**8] Mr. Powell's role included assisting Mr. Wade in obtaining legael advice, Mr. Wade does not address the fact that he also disclosed the letter to his nephew, Mr. Passey. See Aplt. Br. at 3 (claiming that the letter "was reviewed *only* by Wade, Janet and Powell") (emphasis added); see also III Aplee. Supp. App. at 491 (district court's remarking that parties agreed letter was disclosed to Mr. Powell and Mr. Passey). This constitutes an independent ground to uphold the district court's ruling, and it is well supported by the record. Mr. Passey testified that anytime Mr. Wade met with his attorneys, he wanted a witness. III Aplee. Supp. App. at 454. Mr. Passey's role as a witness, however, had nothing to do with facilitating attorney-client communications about UBOs. Id. at 454-55. Thus Mr. Wade's disclosure of the letter in the process of venting about the quality of the advice he received (and its expense) had no connection with any responsibilities Mr. Passey had to the Wades individually.

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(2)

Supreme Court, U.S.
FILED
FEB 10 2010
OFFICE OF THE CLERK

Case No. 09-655

IN THE

SUPREME COURT OF THE UNITED STATES

October 2009 Term

STANLEY L. WADE,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Stanley L. Wade,
Pro Se
#02662-081
Federal Prison Camp
POB 5000
Florence, CO 81226

GROUNDS FOR REQUESTING REHEARING

Pursuant to Supreme Court Rule 44(2), a Petition for Rehearing is appropriate if there are "substantial grounds not previously presented." Although Petitioner raised Questions 3 and 6 pertaining to the error of the Court of Appeals in exceeding its jurisdiction by deciding the merits of Petitioner's issues on appeal, and whether the Tenth Circuit should have issued a Certificate of Appealability, Petitioner asserts that this Court was not aware of the fact that the Tenth Circuit routinely violates this Court's clear instructions, as set forth in *Miller-El v Cockrell*, 537 U.S. 322, 327, and 336-337.

Petitioner believes that this Court has an obligation to exert its supervisory powers over the lower courts by clarifying that the routine practice of the Tenth Circuit in examining and deciding issues before having jurisdiction to do so is not to be tolerated.

Note: A copy of Petitioner's Supreme Court Rule 44(2) Compliance is to be found at page 14.

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REASONS FOR GRANTING REHEARING

1. It is the most basic of fundamental rules that a court assure itself of its jurisdiction before proceeding in any matter.

In *Steel Co. v Citizens for Better Env.,* 523 U.S. 83, 93-95, this Court said this concerning jurisdiction:

> "Even if the statutory question is not 'framed in terms of "jurisdiction,"' but simply 'characterized as whether respondent's complaint states a "cause of action,"' 'it is also clear that we have the power to decide the statutory question first [Quoting Justice Stevens' concurrence.] ... This is essentially the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, at least where the merits question is more readily resolved ... The Ninth Circuit has denominated this practice—which it characterizes as 'assuming' jurisdiction for the purpose of deciding the merits—the 'doctrine of hypothetical jurisdiction.' ...
>
> "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "*Without jurisdiction the court cannot proceed at all in any*

> *cause.* Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' *Ex parte McCardle,* 7 Wall 506, 19 L Ed 264 (1869).... The *requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' Mansfield, C. & L. M. R. Co. v Swan,* 111 US 379, 382." (Brackets and ellipsis deleted; emphasis added.)

In *Miller-El v Cockrell,* 537 U.S. 322, 336-337, this Court said:

> "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying it denial of a COA based on its adjudication of the actual merits, it is in essence *deciding an appeal without jurisdiction.*" (Emphasis added.)

When a Movant files a § 2255 Motion with the district court, and that court denies the Motion and relief requested, typically the Movant will file a Notice of Appeal and an Application for a Certificate of Appealability in order to comply with 28 U.S.C. § 2253(c). In the Tenth Circuit, a district judge is not

required to grant or deny a COA. Rather, Tenth Circuit Rule 22.1(C) states that "[f]ailure of the district court to issue a certificate of appeal ability within thirty days of filing the notice of appeal shall be deemed a denial." *No other circuit has such a rule*, most opting for the F.R.A.P. 22(b)(1) requirement.

However unsettling it is for a Movant to wait for a COA when he has made a properly supported application to the district court, often waiting beyond the 30 days Tenth Circuit Local Rule 22.1(c) sets, it is vastly more important for this Court to recognize that the Tenth Circuit Rules require an Appellant—even when he or she has not received a COA—to file his opening brief so that the panel may consider it along with the Application for a COA.

The consequence is that the Tenth Circuit typically bases its decision on whether or not to grant a COA when the district court has failed to grant a COA—either by order or by inaction—on far more than a threshold inquiry into the matter, as this Court instructed in *Miller-El*. Such was the case in the instant matter. In fact, the opening brief, if not filed with the Application for a COA, is grounds for dismissal of the Appeal: "[A]ppellant must file an Application for Certificate of Appeal ability ... within 40 days ... Appellant must file an opening brief within 40 days ... Failure to file a brief is grounds for dismissal without further notice," the Tenth Circuit's instructions state.

This rule facilitates a violation of this Court's

instructions in *Miller-El*, that "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." (*Id.*, 537 U.S. at 327) This, in turn violates the fundamental requirement that "jurisdiction be established as a threshold matter ... [which] is inflexible and without limitation." (*Steel Co.*, 523 U.S. at 95)

Petitioner did not believe it necessary in his Petition for a Writ of Certiorari to underscore the severity of the violation practiced by the Tenth Circuit; hence, this Petition for Rehearing is appropriate under the standard that this is a 'substantial ground not previously presented.' (Supreme Court Rule 44(2))

2. The practice of deciding the issues before granting a COA or after denying a COA is widespread among the judges in the Tenth Circuit.

Before this Court underscored the necessity of limiting a circuit court's inquiry to a threshold inquiry into the underlying merits of the issues an Appellant intends to raise on appeal (*Miller-El*, 537 U.S. at 322), violating this principle might be excused. After all, the courts were still grappling with the AEDPA requirements for some time after April 26, 1996, including changes to 28 U.S.C. § 2253. But, after this Court's decision in *Miller-El*, there really is no excuse for attempting to explore in detail the underlying issues and rendering an opinion as to the merit or lack thereof when deciding whether or not to grant a COA.

Pre-*Miller-El* denials of COAs.

In *English v Cody,* 241 F.3d 1279 (10th Cir. 2001), the court denied a COA. However, it spent several pages examining the record in detail, finding that the grounds raised in English's § 2255 were lacking in merit. It determined that English's claims of ineffective assistant of counsel, his procedural bar to suggestive photo identification claims, his Confrontation Clause claims, faulty eyewitness testimony claims, etc., were groundless. In reaching that conclusion, the court were far beyond a "threshold inquiry into the merits."

In *McCracken v Gibson,* 258 F.3d 970, 984 (10th cir. 2001), the court never did grant a COA, or even mention one until the end of the decision. (*Id.*, at 984) Yet, it considered in great detail the issues McCracken wished to raise on appeal and decided all of them were without merit in a 10-page decision. This was far in excess of what the court had jurisdiction to consider.

These examples illustrate that the Tenth Circuit—at least pre-*Miller-El*—thought nothing of deciding the issues whether or not it had jurisdiction to do so. Yet, the following post-*Miller-El* cases show the unconstitutional practice continues.

In *United States v Springfield,* 337 F.3d 1175, 1177 (10th Cir. 2003), the court denied a COA; however, it stated in its ruling that "[i]n examining

whether the district court's 'resolution was debatable amongst jurists of reason,' courts should not undertake a 'full consideration of the factual or legal bases adduced in support of the claims.' *Miller-El v Cockrell,* 537 U.S. 322, 128 S.C. 1029, 1039 ... Rather, 'the COA determination under § 2253(c) requires an *overview* of the claims and a general assessment of their merits.' *Id.*" (Brackets deleted; emphasis in the original.) Thus, the Tenth Circuit panel admits that it knows what this Court's standard is, as set forth in *Miller-El.*

In *United States v Taylor,* 454 F.3d 1075, 1077 (10th Cir 2006), the court, in bold letters said: "**ORDER DENYING A CERTIFICATE OF APPEALABILITY.**" Then the court went to great lengths to decide the merits of Taylor's claims of ineffective assistance. Taylor had raised several examples of ineffectiveness in his Motion: Failures respecting a violation of the Speedy Trial Act sentencing range, (*Id.*, at 1078), misinformation about sentencing range (*Id.*, at 1079), no challenge to career-offender classification, (*Id.*, at 1080), and failure to challenge the indictment, (*Id., at 1081*). Then after considering in depth these issues, the court said "[w]e DENY a COA and DISMISS his appeal." (*Id.*, at 1082)

These post-*Miller-El* opinions in the Tenth Circuit demonstrate a continuing disregard for this Court's clear instructions in *Miller-El.* If, indeed, the courts of appeals have no jurisdiction to do more than a "threshold inquiry" into the merits of the claims an Appellant wishes to raise in his appeal, it

should never take multiple pages to explain why a COA is denied. The determinative factor in deciding whether or not to issue a COA has been stated over and over again by this Court as being a "substantial showing of the denial of a constitutional right," and whether jurists of reason *could* find the way the district court determined these constitutional issues, or whether jurists of reason *could* find that the issues deserved encouragement to proceed farther. Anything more than that exceeds the jurisdiction of the appellate court.

3. The manner in which the Tenth Circuit handles Applications for a COA further prejudices an Applicant because it encourages, not just an opening, but an abbreviated opening brief, and when it uses that to delve behind a "threshold inquiry," it denies the Applicant the opportunity to fully brief and support his issues.

When a COA is granted, an appellant is normally advised of a briefing schedule. He then has the opportunity and time to research and develop his issues and caselaw in support *for the issues certified.* When the Tenth Circuit insists that the appeal brief—a Pro Se brief for is enclosed—be filed at the same time as the Application for a COA, it provides inadequate time for the appellant to properly prepare his arguments.

In many cases, an appellant spends the bulk of his Pro Se Brief or even one fully "comply[ing] with the Federal Rules of Appellate Procedure and Tenth Circuit Rules," (quote from instruction letter

sent to applicants for a COA), arguing issues which the court of appeals isn't going to consider to begin with. Or, if the court of appeals denies a COA on one or more issues, but grants it for one or more other issues, it denies the appellant the opportunity to argue for an enlargement of the certified issues in the COA.

In Petitioner's case, the Tenth Circuit admitted in its direct appeal decision that appellate counsel made very serious errors, but then concluded that it wouldn't have made any difference in the jury's decision anyway. Now, how in the world could the Tenth Circuit arrive at that conclusion without examining the record in depth? If they did examine the record in depth, they violated this Court's clear instructions in *Miller-El*. If they did not do so (which would have required examining the transcripts in detail), then their conclusion was unsupported, aside from being in excess of their jurisdiction.

Petitioner, as instructed by the Tenth Circuit, did file, along with his Application for a COA, a Pro Se Brief. He did not, nor could he within the limits of that informal opening brief, fully support his claims. After the Tenth Circuit's having seen for itself, from its own decision on direct appeal, that appellate counsel made serious errors, and seeing that a serious constitutional violation was claimed, and seeing—in the Application for a COA—that many jurists of reason would have decided the ground raised in his § 2255 differently, and that he was prejudiced, that ought to have been the end of the consideration as respects whether or not to certify that issue and,

if they had done so, Petitioner could have fully briefed that issue and supported it from the record and transcripts as being prejudicial. Petitioner was denied that right!

The strategy for arguing the grounds as to why a COA should have issued on a particular issue, and the strategy for supporting the issue on appeal, are entirely different. The standards for review are entirely different. The Tenth Circuit's blatant disregard for this Court's clear instructions and the constitutional and statutory rights of Petitioner, and others similarly situated, is a serious breach of the duty the Constitution, Congress, and this Court has placed upon the circuit courts of appeal. This Court is likely unaware of the degree of noncompliance of which the tenth Circuit is guilty, nor of the effect this had on Petitioner's Application for a COA.

Herein, Petitioner has cited but a few examples of *published* opinions and decisions of the Tenth Circuit on Applications for a Certificate of Appealability. There are dozens and dozens more in the Fed-Apps. cases which are not cited by Petitioner. Petitioner knows of no other circuit which disregards the law of this Court, the mandate of Congress in 28 U.S.C. § 2253(c), and the Constitution, as freely as does the Tenth Circuit.

The F.R.A.P. 22(b) says nothing about requiring an opening brief—whether a simplified "Pro Se Brief" or an Appellant Brief in full compliance with F.R.A.P. and Local Court of Appeal Rules—to be filed along with an Application for a Certificate of Appeal-

ability. The Federal Circuit follows the F.R.A.P. 22(b). The D.C. Circuit follows the F.R.A.P. 22. The 1st Circuit follows the F.R.A.P. 22(b), calling it a "Certificate of Probable Cause. The 2nd Circuit largely follows F.R.A.P. 22(b), adding under Local rule 22, that if denied a COA by the district court, the Applicant must apply for a COA with a motion within 21 days following advice from the clerk. The 3rd Circuit's Local Rule 22.0 follows a similar wording as that of the 2nd Circuit, adding in Local Rule 22.2—completely contrary to the Tenth Circuit's Local Rule—that if the district judge has not granted a COA by the time the appeal is docketed, the clerk must "remand[] the case to the district court for a prompt determination as to whether a certificate should issue. The 4th Circuit's Local Rule 22(a)(1)(A) authorizes the filing of an application for a COA. Subsection (B) adds that if no application under (A) is made, then the clerk is to request an initial brief to aid the court in deciding whether a substantial showing of the denial of a constitutional right exists—again, this is *only* where the appellant has not asked the appeals court for a COA. The 5th Circuit follows F.R.A.P. 22. The 6th Circuit largely adopts F.R.A.P. 22, though it adds that if the district court denies a COA, the appellant must promptly request same from the court of appeals. (6th Circuit Local Rule 22(a)) the 7th Circuit follows F.R.A.P. 22, as does the 8th Circuit. The 9th Circuit follows F.R.A.P. , adding that the request for a COA "must be first considered by the district court" and that the appeals

court "will not act on a motion for a COA if the district court has not ruled first." (9th Circuit Local Rule 22-1(a)) The 11th Circuit generally follows F.R.A.P. 22, though it requires the district court to grant or deny first.

The Tenth Circuit appears to stand alone in its provisions that; (1) the failure of the district court to grant or deny is to be construed—without notice to the appellant—as a denial of a COA; and (2) that the Application for a Certificate of Appealability must be accompanied by a "Pro Se Brief," a simplistic, generic opening brief, or an opening brief fully compliant with the F.R.A.P. and Tenth Circuit Local Rules—no other circuit requires this or presumes denial if the district judge fails to grant or deny. These unique deviations from the F.R.A.P. and this Court's instructions affect the fundamental rights of appellants, including Petitioner.

4. The clear and indisputable violations of the mandates of Congress, the Constitution, and this Court, call for this Court to exercise its supervisory powers.

In *Young v U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809, this Court said this: "The exercise of supervisory authority is *especially appropriate* in the determination of the procedures to be employed by courts *to enforce their orders, a subject that directly concerns the functioning of the judiciary.*" (Emphasis added.)

Noteworthy is the fact that the Tenth Circuit's own supervisory power, as explained in *United States v Hasting*, 461 U.S. 499, 505 (1983), is not implicated. The Court explained that: "*Guided by considerations of justice,*...and in the exercise of supervisory powers, federal courts may, *within limits*, formulate procedural rules not specifically required by the Constitution of the Congress.... [These are appropriate] to *preserve judicial integrity* by ensuring that a conviction rests on appropriate considerations validly before the jury." Instead, the procedures employed by the Tenth Circuit validated something which was not "validly before the jury." It lent its imprimatur on an erroneous decision based upon the clear and admitted (by the Tenth Circuit) of ineffective assistance of appellate counsel. This had nothing to do with "considerations of justice." (Emphasis added.)

CONCLUSION

The grounds Petitioner set forth in his Application for a COA were well supported, both as to making a substantial showing of the denial of a constitutional right and as to demonstrating that jurists of reason would have and had found the district court's decisions in denying Petitioner the relief requested in his § 2255 debatable. It was only by manipulating and misapplying this Court's clear instructions in *Miller-El*, the Constitution and 28 U.S.C. § 2253(c) that he was denied a COA. The Court is urged to exercise its supervisory authority "to enforce [its] orders, a subject that directly concerns the judiciary." (*Young*, 481 U.S. at 809)

WHEREFORE, Petitioner respectfully prays that the Court rehear his Petition for Certiorari and remand the case back to the Tenth Circuit with instructions to conform its Local Rules to F.R.A.P. 22, this Court's decision in *Miller-El*, and for such other and further relief as the Court may deem just and equitable, certifying the issues presented for appellate review in a COA.

By executing this Petition for Rehearing, Petitioner declares that the statements herein are true under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this _____ day of February, 2010.

/S/ Stanly L.Wade
Petitioner, Pro Se

Case No. 09-655

IN THE

SUPREME COURT OF THE UNITED STATES

October 2009 Term

STANLEY L. WADE,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CERTIFICATE OF COMPLIANCE

This is to certify that this Petition is restricted to the grounds specified in Supreme Court Rule 44(2), and that it is presented in good faith and not for delay.

Dated February ____, 2010.

Stanley L. Wade

Stanley L. Wade, Petitioner
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